

Questions in Politics

The Journal of the Georgia Political Science Association
Volume IV

To Defer or Not Defer: The Dilemma of Federal Courts of Appeal Determining the Reach of US Law¹

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The duty of the courts in America is, as John Marshall said, “to say what the law is.” In the area of international diplomacy, however, the president is the sole voice of the nation. In an increasingly interconnected world, judicial interpretation of the law’s meaning can cause diplomatic tension and conflict. This is particularly true when American courts decide to apply US statutes to regulate conduct that occurred abroad. Although courts have generally deferred to the executive’s determinations of the foreign policy consequences in such situations, scholars argue that a revolution is in progress. The Supreme Court is less willing to defer to the executive on these matters. Less is known about the reaction of the lower federal courts to this trend. This article examines the approaches employed by the Federal Courts of Appeal in determining the reach of US law. It shows that the executive branch’s influence in these cases is highly contingent on the position it takes, and that the combined impact of legal factors is stronger than that of judges’ policy proclivities. These results add to growing evidence of a decline in deference to the Executive and provide insight into how courts are adapting to our increasingly globalized economy.

Justice Stephen Breyer recently noted the challenges judges face because of “an ever more interdependent world,” and concluded “it has become clear that, even in ordinary matters, judicial awareness can no longer stop at the border” (Breyer 2015, 4). The nature of litigation has changed as routine

¹ I thank Brett Curry, Lisa Holmes, Linda Camp Keith, Robert Lowry, Banks Miller, Clint Peinhardt, James Larry Taulbee, the editors, and the anonymous referees for valuable comments on this project.

transactions cross national boundaries (Breyer 2015). Seemingly domestic cases increasingly have international consequences (Breyer 2015). Federal appeals courts must determine the reach of the US government's regulatory authority in this environment. Courts will often defer to executive expertise in this arena, adhering to the idea that issues arising in foreign affairs cases are distinct from those present in domestic litigation and should be subjected to a different standard (Bradley 1999).² However, recently scholars have drawn attention to a decline in such deference (Sitaraman and Wuerth 2015).³ Admitting that the courts are not as informed as other branches about American foreign relations, Supreme Court justices have expressed a willingness to take this step (Breyer 2015).⁴ However, few studies examine the lower federal courts' readiness to make decisions independent of executive pronouncements in foreign affairs cases.

In this article, I investigate the extent to which lower federal courts challenge the Executive in one type of foreign affairs case, suits in which the plaintiff asks the court to apply US statutes to regulate conduct occurring abroad, and to identify factors significantly influencing this decision. I focus my analysis on the Federal Courts of Appeal because they decide many more cases than the Supreme Court and are the last resort for the majority of litigants (Hettinger, Lindquist, and Martinek 2006; Songer, Sheehan, and Haire 2000). Little is known about the degree of deference to the Executive in foreign affairs cases at this level of the judicial hierarchy. Although courts are hesitant to apply US law abroad if the Executive is against such an extension, they will make independent judgments concerning the foreign policy consequences of their decisions when the Executive is in favor of the application of US law. Furthermore, my results indicate that principles of international law influence judges more than their policy proclivities. These findings are important because, given our increasingly interdependent world and globalized economy, these types of legal cases are likely to increase in the future. Understanding patterns and trends in how the Courts of Appeal are handling these disputes is a valuable contribution to the field of judicial politics.

This article proceeds as follows. First, I present scholarly evidence that judicial deference in foreign affairs cases is declining. Second, I explain the legal principles governing the subset of foreign affairs cases analyzed in this study, those involving the extraterritorial application of US law. Third, I discuss

² Bradley (1999) defines the term employed in legal scholarship for this phenomenon, "foreign affairs exceptionalism," as "the view that the federal government's foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers" (1096).

³ Sitaraman and Wuerth (2015) refer to this decline in deference as "normalization" (1901).

⁴ Justice Breyer notes this reality and expresses hope that lawyers and academics will close the "information gap" (Breyer 2015, 114).

measurement and modeling issues before presenting my results. Finally, the conclusion explores the implications of my findings.

The Decline of Deference to the Executive in Foreign Affairs Cases

The judiciary's role is to resolve controversies in accordance with the rule of law and to exercise the power to void the actions of Congress and the president that are contrary to the ideals of justice enshrined in the Constitution (*Considering the Role of Judges* 2011). Litigation with an international component in national courts, or foreign affairs litigation, challenges judges in fulfilling this role (Mahoney 2013). Since the Supreme Court decided *U.S. v. Curtis-Wright* in 1936, the courts have granted the Executive wide-reaching power in international affairs. Courts make sharp distinctions between domestic and foreign affairs, and hold that the federal government is not limited by the usual constitutional constraints in the latter (Bradley 1999). Judges practicing this type of deference employ arguments in a manner in foreign affairs cases not seen in analogous domestic cases (Bradley 1999). Scholars note a decline in this type of reasoning and of deference to the Executive's assessments of foreign policy interests in cases where one would expect both (Bradley 2000, 659–63).⁵ Courts have shifted the analysis from constitutional arguments relying on the unique role of the Executive to reasoning employing ordinary principles of administrative law and tools for interpreting statutes (Sitaraman and Wuerth 2015).

This shift occurred in three waves: post–Cold War academic criticism of this type of deference (1990s); the Supreme Court's post–September 11th rejection of executive arguments in war on terror cases; and the Roberts Court's treatment of foreign relations cases without resort to sharp distinctions between domestic and foreign affairs in its reasoning (Sitaraman and Wuerth 2015). Political scientists have also documented the trend. Evidence suggests that the Supreme Court not only makes decisions concerning American foreign policy, it has often ruled against the executive branch (King and Meernik 1999a, 1999b). Researchers documenting the decline in judicial deference admit the process is not yet complete (Sitaraman and Wuerth 2015). Scholars recognize that the Supreme

⁵ Bradley identifies five overlapping subsets of foreign affairs exceptionalism, or types of deference to the Executive: the political question doctrine, where the president's decision is in his authority (citing *Terlinden v. Ames* 1900); executive branch lawmaking deference, shown to executive agreements and grants of head of state immunity (citing *Dames & Moore v. Regan* 1981 and *The Schooner Exchange v. McFaddon* 1812); *Chevron* deference, or respect to permissible agency constructions of a statute (citing *INS v. Aguirre-Aguirre* 1999); persuasiveness deference, general respect stemming from the Executive's status as a "knowledgeable representative"; and international facts deference, or respect for the executive branch's assessment of US foreign relations interests (citing *Department of the Navy v. Egan* 1988).

Court has left untouched dozens of lower-court rulings resting on sharp distinctions between domestic and foreign affairs (Vladek 2015).⁶ Thus, justices may be ready to reject executive deference in foreign affairs cases, but are not yet willing to force the approach on lower-level federal judges (Vladek 2015).

Because the Supreme Court sends “mixed signals” (Vladek 2015, 330), with inconsistent case law in particular issue areas, the trend toward declining deference may be weaker in the lower levels of the federal judiciary (Bradley 2015). The Courts of Appeal struggle to define legal doctrine in foreign affairs cases. For example, legal scholars note that the circuit courts have not clearly defined what amounts to giving “serious weight” to executive opinions in private actions against foreign parties (Clarens 2007, 428). Political scientists have produced evidence that lower courts are even less likely than the Supreme Court to decide in favor of the Executive (King and Meernik 1999b). Researchers also document a willingness among federal appellate courts to find in favor of civil liberties claims despite executive assertions of national security interests. However, the probability that a particular court will take this approach appears to be contingent on variations in judicial philosophies (Randazzo 2010). Results may also depend on the type of deference considered (Bradley 2015).⁷

One central aim of this article is to draw attention to a significant, often overlooked, dimension of this ongoing debate about the degree of judicial deference. We know little about how lower court judges decide cases implicating US foreign policy interests when they challenge executive assertions or make decisions without guidance from the political branches of government. It is important to understand judicial decision-making in this context because judges are making foreign policy determinations. Foreign policy, expressed as a declaration of intent or in the form of action, sets America’s relations with the world (Hastedt 2015). This process necessarily involves choices about the importance of US relations with other nations. Ties to some states will rank as higher priorities than those with others. In deciding whether to apply US law in a case in which states have overlapping jurisdiction, judges make choices that may offend other nations. In their willingness to offend some states but not others, judges express a ranking of American relationships abroad. Judges communicate American priorities, making decisions that could conflict with Congress’ and the Executive’s intentions for the conduct of US foreign affairs. Specifically, with regard to the subject of this analysis, extraterritorial application of American standards can frustrate the efforts of diplomats to achieve regulatory

⁶ Vladek (2015, 322) cites *Janko v. Gates* (2014, 2015) and *Carmichael v. Kellogg, Brown & Root Servs. Inc.* (2009, 2010).

⁷ For example, legal scholars suggest that the lower courts will generally accord significant, often dispositive, deference to the executive branch with respect to whether to grant immunity to foreign officials.

coordination with other states, a complex process of international bargaining between actors with, at times, divergent preferences (Drezner 2007).⁸ When US courts unilaterally apply aggressive economic regulations and labor standards to actions committed in lesser-developed countries, they risk triggering accusations of American imperialist behavior. In other cases, international norms, such as the prohibition against torture, may encourage US courts to act or even mandate that they do so. Judges must weigh important foreign policy considerations in any case that involves the extraterritorial application of US law. The goal of the next section is to explain the legal principles governing this category of foreign affairs cases.

Legal Principles Governing the Extraterritorial Application of US Law

State regulation of conduct outside their borders is occurring more frequently and is extremely controversial (International Bar Association 2009, 5). International law recognizes five bases for regulating conduct: territorial (objective and subjective), nationality, passive personality, protective, and universal. A state may apply its domestic law when the conduct occurs in its territory (subjective territorial principle) or the actions have substantial effects in the state's territory (objective territorial principle) (International Bar Association 2009, 12).⁹ A state's law is also applicable if a defendant (nationality) or a victim is a national (passive personality), when the activity could damage the state's vital interest (protective) (International Bar Association 2009, 12), and for "horrific crimes ... of universal concern" (universal) (Meyer 2010, 144).¹⁰ In the latter cases, any state may prosecute the accused wherever found (Knox 2010). Because these grounds for jurisdiction are not mutually exclusive, more than one country may have authority under international law to decide a case, creating conflicts among states with overlapping jurisdiction (Knox, 2010). As world markets become increasingly interconnected, this situation occurs more frequently, generating "novel questions of law" (Coleangelo 2011, 1021). Plaintiffs can circumvent the legal systems of other nations in order to take advantage of the many benefits offered by US courts, such as mandatory jury trials, opt-out class actions, and freedom from liability for defendant's

⁸ For example, states with middle to high income levels can afford to impose stringent economic regulation, while societies focused on obtaining the basic necessities of life may view strict standards as a luxury they cannot support.

⁹ For example, the International Bar Association noted that US courts have employed the effects doctrine in interpreting antitrust law. My study focuses on the area of public international law governing when states can apply their domestic laws to a dispute, rather than mundane questions of private international law in which choice of law depends upon different rules.

¹⁰ Meyer cites the Restatement (Third) of the Foreign Relations Law of the United States.

litigation costs (Baker 2013). Other nations do not accept these “plaintiff-favoring rules and remedies [as a matter of public policy]” (Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom 2013, 26–29). Applications of US law can therefore be viewed as unreasonable interference with another sovereign’s policy choices reflecting “unique socio-economic conditions” (Brief for the Government of Canada 2004, 2) and labeled “judicial interference” with the national sovereignty of the territorial state (Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom 2013, 6, 12–13, 24).¹¹ In making such arguments, other nations have played on judicial concern for US economic interests abroad. For example, Canada asserted the need for mutual cooperation, given the fact that the United States and Canada enjoy the “largest bilateral trading relationship in the world” (Brief for the Government of Canada 2004, 1). States have explicitly pointed out that application of US laws “to foreign nationals and foreign conduct have rightly been criticized on grounds of foreign relations, international law or comity, often by the U.S.’s closest allies” (Brief of the Governments of the Federal Republic of Germany and Belgium 2004, 10). Clearly, when judges apply American law in any of these situations, they risk undermining US relationships abroad.

Congress often does not give courts guidance on this issue, failing to define the geographical reach of most statutes (Meyer 2010). Nor does case law provide clear rules to employ in tackling these controversies. For example, in applying one of the central canons of construction implicated in these cases, the presumption against extraterritoriality, courts have developed, as the Supreme Court stated, “a collection of tests for divining what Congress would have wanted, complex in formulation and unpredictable in application” (*Morrison v. National Australia Bank, Ltd.* 2010, 248). This canon of construction holds that courts should assume that Congress did not intend a US statute to apply to extraterritorial conduct unless Congress expressly states that purpose (*Murray v. Schooner Charming Betsy* 1804).¹² Within a single issue area, the standard of the Court varies.¹³ Lower federal courts must wrestle with vague and competing standards. Their approach

¹¹ The foreign governments objected to the assertion of US courts’ authority to adjudicate claims filed by Nigerian villagers against companies incorporated in the Netherlands and England because the involvement of a US corporate affiliate was insufficient to establish jurisdiction, the conduct in this case did not have a sufficiently close connection to the United States, and universal jurisdiction is generally limited to criminal cases.

¹² The Court stated that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains” (118).

¹³ For example, in *Hartford Fire Insurance Co. v. California* (1993), the Court focused on the “substantial effect” on US trade in applying the Sherman Act to foreign conduct (796). However, in *F. Hoffman-La Roche Ltd. v. Empagran S.A.* (2004), the Court rejected the application of the Sherman Act to foreign conduct because it was “unreasonable” considering the competing state’s ties to and interests in regulating the activity (175).

will depend on which line of Supreme Court precedents they follow (Knox 2010). In addition, the Supreme Court has not directly addressed the relationship between the presumption against extraterritoriality and *Chevron* deference to the Executive (Bradley 2000). *Chevron* deference is a principle of administrative law that requires courts to defer to a government agency's interpretation of a statute it administers if the statute is ambiguous or silent on the issue, and the agency interpretation is a reasonable and permissible construction of the statute (*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 1984). This poses a dilemma if the application of a law raises the issue of its extraterritorial validity, but the executive agency insists it applies; the court will have no clear guidance on how to resolve the conflict between the two principles (Bradley 2000). Judges struggle to balance the competing interests in these cases, explicitly recognizing that an assertion of US authority risks sparking "international discord" (*Kiobel v. Royal Dutch Petroleum* 2013, 1664). Judges may try to predict the reaction of other states to the application of US law in a dispute over which they have concurrent jurisdiction. I expect judges will look to international legal principles defining acceptable bases for applying US law in this situation. In my analysis below, I measure the weight of these principles compared to that of executive pronouncements, and the judge's policy preferences.

Data and Variables

To investigate the relative influence of legal and policy factors on judicial decisions to apply American standards abroad, I constructed a dataset of US Courts of Appeal cases involving the extraterritorial application of US laws from the LEXIS NEXIS database. As noted above, judges on these courts hear a considerable number of wide-ranging claims, far more than the Supreme Court (Hettinger, Lindquist, and Martinek 2006; Songer, Sheehan, and Haire 2000). For example, in fiscal year 2002, the circuit courts resolved almost 58,000 appeals, covering most areas of federal law (Hettinger, Lindquist, and Martinek 2006). I gathered a set of 113 civil suits filed by individuals and corporations, decided between 1964 and 2015, involving an issue of the application of US law to conduct occurring abroad.¹⁴ Because my focus is deference to the executive branch in civil cases, I did not include criminal cases in which the US government prosecuted individuals for foreign conduct. I also excluded cases in which the US Executive is the defendant,

¹⁴ Using the search term "extraterritorial w/5 application," I retrieved over 400 cases involving the extraterritorial application of US law. I narrowed the initial results to cases in which at least some conduct occurred outside the United States, and the court was asked to assert jurisdiction and enforce American standards.

as prior studies thoroughly explore this issue.¹⁵ I added to this pool 49 US appellate court decisions concerning the application of the Alien Tort Statute (1789) studied in my prior research, increasing the case count to 162.¹⁶ Data concerning US trade relationships, an important variable in my investigation, was available only through 2012. As a result, I had to drop 32 cases from the quantitative analysis, leaving 130 decisions in my total dataset. A broad array of cases is included. For example, my dataset contains claims based on American antidiscrimination laws and employment regulations, and disputes over commercial transactions.¹⁷

As noted above, I am primarily interested in measuring the influence of the Executive's position and of legal principles governing this area of law. I employed several variables to measure the significance of the presence of a basis for regulating foreign conduct under international law. I expect this factor will increase the probability that a court will apply US statutes. To measure the influence of a basis for territorial jurisdiction, the strongest grounds for applying US law, I included *U.S. conduct*, a variable coded 1 if any conduct relevant to the dispute arguably occurred in the United States, and 0 if otherwise.

My reading of the cases indicated that courts do indeed consider claims of US conduct, or a lack of such a claim, to be a significant factor. For example, in cases involving the application of the Securities and Exchange Act abroad, courts discussed in depth the extent to which conduct arguably occurred in or had substantial effects on US territory (subjective and objective territorial jurisdiction). *Morrison v. National Australia Bank* (2008) provides an illustration. The court focused on whether the foreign plaintiffs alleged that conduct directly causing losses to investors occurred in the United States (*Morrison v. National Australia Bank* 2008). Because the foreign defendant's actions in the United States were "merely preparatory," the Securities and Exchange Act did not apply (*Morrison v. National Australia Bank* 2008, 176).¹⁸

¹⁵ As mentioned above, prior studies have examined courts' willingness to challenge executive decisions, particularly in judging its actions in the war on terror (Randazzo 2010). I did include cases in which the plaintiff appealed a decision by an executive agency, however, as the conduct concerned was not committed by an executive agency, but rather by a private defendant. In addition, I wanted to explore the impact of the defendant's home country's trade ties to the US government. I could not do so in cases in which the US government is the defendant.

¹⁶ The Alien Tort Statute (ATS) (1789) gives US courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." It has been applied to hold foreign citizens accountable for human rights violations. For example, in *Filártiga v. Peña-Irala* (1980), the Second Circuit found that US courts had jurisdiction over allegations of the torture and murder of a Paraguayan boy in Paraguay by a Paraguayan official.

¹⁷ Laws implicated included, for example, Title VII of the Civil Rights Act (1964) and the National Labor Relations Act (1935).

¹⁸ The Second Circuit found significant "the striking absence of any allegation that the alleged fraud affected American investors or America's capital markets" (*Morrison v. National Australia Bank* 2008, 176).

I included the indicator *U.S. defendant*, coded 1 if a defendant is a US citizen and 0 if not, to account for applications of US law based on the nationality principle. Courts appear to find the nationality of defendants (nationality principle) to be an important factor, explicitly considering this issue when the defendant's status as a US corporation was disputed.¹⁹ Similarly, to measure the impact of the passive personality principle, I included the variable *U.S. plaintiff*, coded 1 if a plaintiff was a US citizen or corporation and 0 if not. Plaintiffs' nationality was noted as a basis for applying US law in several cases.²⁰

I also account for the impact of allegations that a heinous criminal offense serving as a basis for universal jurisdiction occurred. Courts discussed the characterization of an offense as a crime of universal concern at length in numerous ATS cases.²¹ I operationalize violations of international human rights norms as abuses of physical integrity rights that are condemned by the international community: torture, genocide or crimes against humanity (Davis 2006, 2008). The variable, *physical integrity violation*, is coded 1 if the plaintiff claims a violation of physical integrity on the grounds discussed above, and 0 if no such claim is made (Davis 2006, 2008). I did not find any evidence that courts considered whether the conduct in question could damage America's vital interest (the protective principle) in my set of cases. Therefore, I do not employ a variable measuring reliance on this principle. In addition, under international law, a defendant's claim of foreign official immunity can bar suit. For example, courts dismissed several ATS cases because of the defendant's status as a foreign official.²² Thus, I include a dichotomous indicator that takes a value of 1 in cases where the defendant is a foreign state or foreign official, *foreign state/official defendant*.

To measure the influence of the Executive, I read executive submissions in cases in which it asserted a clear position on the application of US law. This occurred in approximately 15 percent of the 130 cases examined in my analysis. I employed two indicators to test for executive deference: *U.S. Executive against* and *U.S. Executive for*. The variable *U.S. Executive against* is coded as 1 if the executive branch expressly asserted a position against the application of US law abroad. The variable *U.S. Executive for* is coded 1 if the Executive expressly communicated its position in favor of such an application. I ran these variables in separate models to compare the impact of each. The literature suggests that executive deference is declining but provides little guidance on variation in impact stemming from the Executive's particular position in this type of case.

¹⁹ See, for example, *Mujica v. AirScan Inc.* (2014).

²⁰ See, for example, *Liu Meng-Lin v. Siemens AG* (2014).

²¹ See, for example, *Filártiga v. Peña-Irala* (1980).

²² See, for example, *Matar v. Dichter* (2009).

Therefore, to formulate my expectations concerning these factors, I closely reviewed judicial opinions in which the Executive asserted a position, looking for arguments based on the distinct role of the Executive in foreign affairs. I considered such arguments to be evidence of deference to the Executive.

Appeals courts appear more likely to defer when the Executive is against extraterritorial application because of claimed negative, practical consequences for American foreign relations.²³ Although agreeing with the Executive as to the outcome under these circumstances, Courts of Appeal have rejected reasoning based on the Executive's unique constitutional role in foreign affairs in numerous cases, resting their rulings on other grounds, such as international comity.²⁴ I found this type of deferential reasoning most often in cases involving determinations of sovereign and official immunity, arguments that applications of American law abroad will violate a US treaty or executive agreement, and executive estimations of resulting international friction.²⁵ For example, in *Tachiona v. United States* (2004), plaintiffs sued a foreign head of state and official for alleged human rights abuses. The Second Circuit allowed the Executive to intervene, emphasizing that the constitutional grants of power to the Executive "are regarded as explicit textual manifestations of the inherent presidential power to administer, if not necessarily to formulate ... the foreign policy of the United States" (*Tachiona v. United States* 2004, 214), and that the government's interpretation was "entitled to great weight" (223). Similarly, in *Matar v. Dichter* (2009), the Second Circuit noted that allowing private individuals to sue foreign officials in US courts could expose US officials to reciprocal actions abroad, and that the Executive "is uniquely positioned to consider how its stance will affect the Government's ability to assert immunity on behalf of US officials sued in foreign courts" (16–18). Drawing on this qualitative examination, I expect that judges will be less likely to extend the reach of US law abroad when the Executive is against such an application.

Appeals courts appear more willing to challenge the Executive if the latter's position is in favor of extending the reach of US law. Generally, an executive agency such as the Securities and Exchange Commission presented

²³ The main exception in my dataset is *Amerada Hess Shipping Corporation v. Argentine Republic* (1987). The Reagan administration argued against the application of the ATS to the case, but the Second Circuit disagreed.

²⁴ See, for example, *Ungaro-Benagas v. Dresdner Bank A.G.* (2004). The Second Circuit agreed with the Executive in its denial of a claim against German banks for stealing assets during the Nazi rule, but relied on international comity analysis rather than the Executive's expressed concern for foreign policy consequences and assertion of the political question doctrine. In *Sarei v. Rio Tinto, PLC* (2008), the Ninth Circuit ignored the Executive's concerns that the application of the ATS in the case could cause serious diplomatic friction, a failure noted in the dissents of Judge Ikuta and Kleinfeld.

²⁵ See, for example, *Hwang Joo v. Japan* (2003), a case concerning sovereign immunity, and *Motorola Mobility v. AU Optronics* (2014), a case involving international fact deference.

the Executive's position and judges dismissed these arguments.²⁶ Courts hearing appeals of administrative agency decisions also exhibited a lack of executive deference.²⁷ Judges rejected assertions of *Chevron* deference to executive agency interpretations concerning congressional intent to apply US law abroad, often relying instead upon the presumption against extraterritoriality. The Second Circuit succinctly explained this approach in *Liu Meng-Lin v. Siemens AG* (2014). According to the court, the presumption "can resolve the question of congressional intent without the need to resort to the interpretation of agency regulations under *Chevron*" (*Liu Meng-Lin v. Siemens AG* 2014, 182). It continued, "[i]t is far from clear that an agency's assertion that a statute has extraterritorial effect, unmoored from any plausible statutory basis for rebutting the presumption against extraterritoriality, should be given deference" (*Liu Meng-Lin v. Siemens AG* 2014, 182).²⁸ I find that language deferring to the Executive is generally absent from this group of cases.

Judges discuss "[t]he fear of outright collisions between domestic and foreign law" that are "a potential source of friction between the United States and foreign countries," and make their own estimation of foreign policy consequences (*Boureslan v. Aramco* 1988, 1021). For example, disagreeing with the EEOC's arguments in favor of applying the Age Discrimination in Employment Act (ADEA) abroad, the Court of Appeals for the Third Circuit focused on congressional intent to avoid international friction, noting congressional awareness that the United States does not have "the right to impose its labor standards on another country" (*Denty v. Smith Klein Beecham* 1997, 150–51). Similarly, the Fifth Circuit declined to give *Chevron* deference to the Department of Justice's assertions that the Americans with Disabilities Act should apply abroad, arguing it was more prudent to apply the presumption against extraterritoriality, to "protect against unintended clashes with laws of other nations" (*Spector v. Norwegian Cruise Line* 2000, 644). I therefore expect that the variable *U.S. Executive for* will not have a significant impact on the decision to apply US statutes to foreign conduct.

²⁶ See, for example, *Boureslan v. Aramco* (1988); *Denty v. Smith Kline Beecham* (1997); *Morrison v. National Australia Bank* (2008); *Liu Meng-Lin v. Siemens AG* (2014); *Spector v. Norwegian Cruise Line* (2004). However, in *Stevens v. Premier Cruise Lines* (2000), the Eleventh Circuit agreed with the executive agency.

²⁷ See, for example, *Asplundh tree Company v. NLRB* (2004); *Keller Foundation/Case Found v. Tracy* (2012); *International Longshoreman's Assoc. AFL-CIO v. NLRB* (1995) (in which the DC Circuit Court failed to discuss extraterritorial application of US law). However, in *Gustafson v. International Progress Enterprises, Inc.* (1987), the DC Circuit exhibited deference in an appeal of an administrative agency decision.

²⁸ In my dataset, the agency interpretation is often expressed in an amicus brief, but the idea that the presumption against extraterritoriality trumps an agency's interpretation could at least partially explain the lack of deference shown in these cases.

Drawing on past studies of foreign affairs cases, I include a variable to account for the probability that courts consider the potential for their decisions to cause international friction (Keith, Holmes, and Miller 2013; Miller, Keith, and Holmes 2015).²⁹ Researchers studying asylum claims employed the level of bilateral trade between the United States and the applicant's country of origin to measure the influence of US interests in preserving "good relations with allies" on judicial decisions (Keith, Holmes, and Miller 2013; Miller, Keith, and Holmes 2015, 63). This indicator is particularly appropriate for my purposes given that, in amicus briefs, nations have referenced their trade relationships with the United States to bolster arguments that the court should be wary of creating international friction.³⁰ As in prior studies, the indicator is lagged one year, and logged to address any skew in the distribution (Keith, Holmes, and Miller 2013; Miller, Keith, and Holmes 2015). The variable *logged total trade* measures the annual level of US trade with the defendant's country of nationality and with the foreign territory on which conduct occurred. I expect courts will be less likely to apply US law to regulate conduct that occurred in the territory of a major trading partner.

To control for the competing orientations that could guide judges in these cases, I obtained information about the policy proclivities of the judges hearing each case. Prior findings in the judicial politics literature indicate that, in general, liberals tend to vote in favor of opening access to the courts, while conservatives tend to close it (Segal and Spaeth 1993, 165). Conservative judges should therefore be less likely than liberal judges to vote to apply US law abroad.³¹ I follow Giles, Hettinger, and Peppers's (2001) approach to measuring judicial policy preferences—the most widely accepted for this level of the US federal courts. The authors employ knowledge gained about the selection process of federal judges by including the influence of home-state senators. When a vacancy occurs in a state in which a senator is from the president's party, the president will generally defer to that senator. Therefore, the senator's Poole-Rosenthal score is used to measure the judge's policy preferences. If two senators in the judge's home state are from the president's party, the variable is coded as the average of their scores. When neither of the senators from the home state are members of

²⁹ The authors found that the probability that an immigration judge grants asylum decreases as the amount of trade between the sending country and the United States increases.

³⁰ See, for example, the Brief for the Government of Canada (2004, 1).

³¹ Legal scholars and political scientists debate the extent to which judges' personal values influence litigation outcomes. I do not wish to assert a strong view on this issues in this article. I assume that judges' notions about the level of deference that the courts should show to other institutions could influence their decision to apply US law in these cases. Political scientists label this type of judicial restraint as policy-oriented behavior, expressing a preference concerning the distribution of government power (Baum 1997, 59). Legal scholars refer to "jurisprudential" orientations influencing the interpretation of the law, or "competing orientations" guiding judges that could be "correlated with alternative political philosophies" (Kahan, Hoffman, Evans, Devins, Lucci, and Cheng 2016, 361).

the president's party, the president's Poole-Rosenthal score is employed because the president likely has the final word (Giles, Hettinger, and Peppers 2001).

The dependent variable in my analysis, *vote for extraterritorial application*, is the vote to apply US law to a case involving foreign conduct. The unit of analysis is the individual judge's vote per nationality of each foreign defendant in a case. Thus, if a claim involves defendants from two different countries, an individual judge's vote is counted twice (once for each defendant). The final number of judicial votes is 516. Modeling on each of the 216 judges' votes allows me to more precisely detect the influence of an individual judge's characteristics (Davis 2006, 2008), and further delineation according to the defendant's nationality and the place of relevant conduct is necessary to determine the effects of US trade relationships unique to each foreign country involved in the case. I employ a selection model: the dependent variable is a dichotomous indicator coded 1 if a judge votes to extend American law to extraterritorial conduct, and 0 if the judge votes against such an application.

Analysis

Because the dependent variable is dichotomous, I use a logit model (Gujarati and Porter 2009). To control for the fact that an individual judge may hear numerous cases in my dataset, I cluster the errors on the judge. My results are reported in Table 1.

I find only modest evidence of deference to the Executive in these cases. In the model employing *U.S. Executive for*, the variable was not significant. For space considerations, I do not include a table with those results, as the findings for the other variables were consistent. In the model employing *U.S. Executive against*, the variable was not significant at conventional levels (0.05), but was significant at the 0.10 level. Because the sample size is small, this is arguably of substantive significance. These results are consistent with my reading of these cases. As Table 2 clearly indicates, rates of deference are heavily contingent on the position of the Executive.

Two facts relevant under international law are highly significant: a contention that some wrongful conduct occurred in the United States and allegations of a violation of an international norm. Judges applied US law more often if a plaintiff made these claims. The level of US trade with states holding competing claims of jurisdiction (either as the defendant's home country or the state in which the conduct occurred) has a highly significant and negative effect on the likelihood that a judge will vote to apply US law to foreign conduct.³² As expected, judges

³² Robust standard errors clustered on the judge are employed for all models to control for autocorrelation and heteroskedasticity.

Table 1: Probability of Extraterritorial Application of US Law

	Statistical Significance	Predicted Probability of a Vote to Apply US Law Abroad	
U.S. Amicus Against	-1.13 (0.65) †	40% (not against)	21% (against)
U.S. Conduct	0.83 (0.33) **	31% (none alleged)	44% (some alleged)
U.S. Plaintiff	0.25 (0.32)		
U.S. Defendant	-0.18 (0.30)		
Physical Integrity Violation	1.42 (0.41) **	28% (not alleged)	55% (alleged)
Foreign State/Official Defendant	-0.36 (0.37)		
Logged Total Trade	-0.20 (0.05) **	66% (trade is low)	30% (trade is high)
Ideology (liberal to conservative)	-0.76 (0.38) *	46% (more liberal)	30% (more conservative)
Constant	0.77 (0.55)		
N of Judge Votes	516		
N of Judges	230		
Wald X2	35.03 (p=0.0000)		

† $p < 0.1$, * $p < 0.05$, ** $p < 0.01$. Robust standard errors clustered on the judge in parentheses. Source: Data from Giles, Hettinger, and Peppers (2001) and Keith, Holmes, and Miller (2013).

Table 2: Rates of Deference in Subset of Cases in which Executive Position Asserted

Percent Executive Favors Extraterritorial Application		Percent Executive Opposes Extraterritorial Application	
42%		57%	
Court Agreed	Court Rejected	Court Agreed	Court Rejected
37%	63%	82%	18%

are less likely to vote to apply American statutes if a state with concurring jurisdiction is a major US trading partner. Finally, the control for judicial ideology reached conventional levels of significance. Judges identified as more conservative are less likely to apply US law to regulate extraterritorial conduct.

I evaluated the substantive impact of each variable by calculating the predicted probability that a judge would decide to apply US law abroad as each

variable changed.³³ The intervention of the Executive has a relatively small effect. When the Executive expressly opposes application of US law, a vote for this outcome is 19 percent less probable.³⁴ Facts relevant under international law have a larger impact than the Executive's position. If a plaintiff claims that the defendant violated physical integrity rights, judges are 27 percent more likely to decide to apply US law to conduct that occurred abroad.³⁵ In addition, when the plaintiff alleges that wrongful conduct occurred in the United States, judges are 13 percent more likely to vote in favor of jurisdiction.³⁶ Taken together, these results indicate that legal factors have a strong influence on outcomes. US trade relationships had the greatest substantive impact, of any one factor, on the decision to apply US law. A judge is 36 percent less likely to vote to apply US law when the trade level is high.³⁷ This finding is worthy of future research, as it may indicate that judges consider trade links when estimating the impact of their decisions on US relationships abroad. Future studies should investigate the mechanism by which this factor influences outcomes. Finally, the impact of the control for judicial ideology—though still statistically significant—is less than that of US trade relationships, the Executive's position, and legally relevant facts. Judges that are more conservative are 16 percent less likely to vote to assert jurisdiction. This is consistent with prior findings in the judicial politics literature (Segal and Spaeth 1993).

Discussion and Conclusion

My findings have several important implications for our understanding of when judges are willing to extend the reach of US law abroad, risking international discord. First, the executive branch's influence in these cases is highly contingent on the position it takes. The executive's arguments have a strong impact when a high-level department is against an extraterritorial application of American standards. I argue such intervention raises a red flag for the courts. They interpret the Executive's position as an indication that foreign policy issues beyond judicial cognizance are at issue, and conclude that the application of US law may embroil them in a foreign relations disaster. Judges therefore do not want to risk causing international friction when the Executive warns of a minefield. At the same time, even when agreeing with the Executive as to the outcome, lower courts reserve their ability to reject the Executive's position in future cases by not consistently employing arguments

³³ I hold all other variables constant at their means.

³⁴ The probability drops from 40 to 21 percent.

³⁵ The probability increases from 28 to 55 percent.

³⁶ An increase from 31 to 44 percent occurs.

³⁷ The probability falls from 66 to 30 percent.

resting on the Executive's expansive foreign affairs power. Judges are more likely to completely reject the Executive's Branch's arguments when the Executive favors extraterritorial application. Courts show little deference to executive agency arguments that US law applies to foreign conduct. Judges give more weight to legal principles based on avoiding international discord (the presumption against extraterritoriality) than they give to doctrines rooted in deference to executive agencies (*Chevron* deference). In these cases, courts independently estimate the likelihood that their decision will cause friction in US relationships abroad.

Second, I find that the combined influence of legal factors is stronger than that of judges' policy proclivities. Ideology certainly matters, but less so than the facts deemed significant under international law. Judges appear more willing to risk negative foreign policy consequences if international legal principles legitimize the application of US law. When a defendant is accused of a crime condemned by the international community, American courts are significantly more likely to hold the perpetrator accountable. In addition, judges are more comfortable applying American law if they can rely on the territorial principle, the most accepted basis for regulating conduct under international law. Scholars should not be too quick to dismiss the significance of legal factors in cases involving complex foreign policy issues.

Much of the scholarly debate thus far has centered on determining if the Supreme Court defers to the Executive on foreign policy. I shift the focus to the Circuit Courts of Appeal, presenting evidence that judges at this level of the court hierarchy reject executive deference under specific circumstances and rely on international legal principles to determine the reach of US law. Courts explicitly make independent judgments concerning the potential that a decision to apply American law will cause international friction. In an increasingly globalized economy, such assertions of power may enable courts to become an equal player in the realm of foreign affairs. Combined with similar phenomena observed by scholars in various areas of the law, judicial application of US legal standards abroad may substantially weaken the president's extraordinary foreign relations powers.



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